Supreme Court, U.S.
FILED

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No.

SUPREME COURT OF THE UNITED STATES

JOSEPH D. JONES, Petitioner,

v.

WAREMART FOODS, INC., Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL,
FIRST APPELLATE DISTRICT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Does a state court have jurisdiction to look behind a final decision rendered through a collective bargaining grievance procedure when there has been no appeal by the aggrieved party and the statute of limitations has expired?

PARTIES TO THE PROCEEDING

All parties are named in the caption. No corporate disclosure statement or similar document has been filed by respondent Waremart Foods, Inc. in any prior proceeding, and petitioner has no information or belief sufficient to provide such a statement here.

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PETITION FOR A WRIT OF CERTIORARI

Joseph D. Jones respectfully petitions for a writ of certiorari to review the opinion and judgment of the California Court of Appeal, First Appellate District, Division One.

CITATIONS OF OPINIONS AND ORDERS

Re: Grievance Filed by Joseph Jones. Decision of internal first level grievance committee dated 7-27-95. [Appendix page A22].

Re: Mr. Joseph Jones. Memorandum decision of parent committee dated September 17, 1995. [Appendix pages A23-A24].

Re: Waremart, Inc., National Labor Relations Board Case No. 20-CA-26962. Unpublished letter dated November 30, 1995 deferring charge to court enforcement of final and binding grievance decision. [Appendix pages A25-A27].

Jones v. Waremart Foods, Humboldt County California Superior Court, Small Claims Division, Small Claims Case No. S38548 - action to enforce final and binding grievance decision. Minute Order of proceedings on 5/31/96; no other formal orders affecting merits. [Appendix pages A28-A29].

Jones v. Small Claims Court, et al., Humboldt County California Superior Court No. 96 CP 0488 - petition for writ of mandate to transfer small claims case to Superior Court. Order for Issuance of Peremptory Writ, etc. filed on July 30, 1996. [Appendix pages A30-A31].

Jones v. Waremart Foods, Humboldt County California Superior Court No. 96 DR 0278 - transferred action to enforce final grievance decision. Findings and Order Granting Summary Adjudication to Plaintiff and Denying Sum-

mary Judgment to Defendant filed on September 5, 1997. [Appendix pages A32-A35]. Judgment filed on April 3, 1998. [Appendix pages A36-A38]. Order Awarding Attorney's Fees filed on August 18, 1998. [Appendix pages A39-A40].

Jones (Plaintiff and Respondent) v. Waremart Foods, Inc.. (Defendant and Appellant), California Court of Appeal, First Appellate District, Division One, Case Nos. A082607 and A084234 - appeal from Superior Court judgment and Order. Unpublished Opinion filed on September 24, 1999. [**Appendix pages A1-A21**]. Unpublished Order denying rehearing filed October 19, 1999. [Appendix page A41].

Jones (Petitioner) v. Waremart Foods, Inc.. (Respondent), California Supreme Court No. S083334 - petition for review. Unpublished Order denying petition filed December 15, 1999. [Appendix page A42.]

BASIS FOR JURISDICTION

Petitioner seeks review of a lower state appellate court opinion filed on September 24, 1999, of which review was denied by the state court of last resort on December 15, 1999.

Petitioner believes that 28 U.S.C. §1257 confers jurisdiction upon this Court to review this case on a writ of certiorari.

APPLICABLE STATUTES

29 U.S.C. § 185. Suits by and against labor organizations

(a) Venue, amount, and citizenship. Suits for violation of contracts between an employer and a

labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

California Code of Civil Procedure § 1288. Service of petitions.

A petition to confirm an award shall be served and filed not later than four years after the date of service of a signed copy of the award on the petitioner. A petition to vacate an award or to correct an award shall be served and filed not later than 100 days after the date of the service of a signed copy of the award on the petitioner.

29 U.S.C. §160. Prevention of unfair labor practices.

(b) ... [N]o complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. ...

STATEMENT OF THE CASE

Petitioner Joseph D. Jones seeks review on a writ of certiorari of a state court opinion that "decided an important federal question in a way that conflicts with relevant decisions of this Court." Rule 10(c).

The California Court of Appeal's decision here is radically at odds with 40 year old principles of federal labor law, in a case where state courts are constrained to apply that law. *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399, 403, n.2 (1988). In *United Paperworkers v. Misco Inc.*, 484 U.S. 29 (1987), this Court reaffirmed controlling principles established in the 1960 Steelworkers trilogy.[1]

> "[T]he courts have jurisdiction to enforce collective-bargaining contracts; but where the contract provides grievance and arbitration procedures, those procedures must first be exhausted and courts must order resort to the private settlement mechanisms without dealing with the merits of the dispute. ... Courts ... do *not* sit to hear claims of factual or legal error ... as an appellate court does in reviewing decisions of a lower court. ... [A] court may not reject ... findings simply because it disagrees with them ... [and] a court should not reject an award on the ground that the arbitrator misread the contract. * * * [A]s long as the arbitrator is even *arguably* construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision." *Id.* at 37-38 (emphasis added).

After being fired from his job as a variety clerk for allegedly leaving work in the middle of his shift, petitioner Jones appealed and was ordered reinstated by a first level grievance panel. [Appendix page A22]. The employer respondent Waremart Foods neither appealed the decision nor reinstated Jones but instead fired him a second time for

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1 *United Steelworkers of America v. American Manufacturing Co.*, 363 U.S. 564 (1960); *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); and *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

the same incident, alleging that Jones had prevailed on a technicality. However, the grievance panel's parent committee refused to rehear the matter on the grounds that there was no new evidence and that the second firing was simply a refusal by management to comply with the earlier decision. [Appendix pages A23-A24]. Respondent Waremart disputed this determination which reaffirmed Jones' right to reinstatement under the original decision, but Waremart again neither appealed either of the decisions nor complied with the order to reinstate Jones.

Jones then filed a charge with the National Labor Relations Board; however the Board deferred to the grievance decision which appeared to the Board to be "final and binding upon the parties" and "[t]herefore ... enforceable in the Courts." Letter dated November 30, 1995 in Case No. 20-CA-29252. [Appendix pages A25-A27].

Jones then filed a small claims action to enforce his decision. Waremart filed no counterclaim or cross-action, but at an oral hearing on May 31, 1996, some eight and a half months after the parent committee had issued its final unanimous written decision upholding Jones' right to reinstatement, Waremart for the first time asked a court to invalidate that decision and order a new grievance hearing on Jones' second firing. Without benefit of legal briefing or counsel (who are barred from practicing in California's small claims courts), the Small Claims judge agreed to recommend a second grievance hearing. [Appendix pages A28-A29]. At this point Jones hired counsel and filed a petition for writ of mandate to divest the small claims court of jurisdiction and compel transfer of the case to the Superior Court. [Appendix pages A30-A31].

The controlling principles of federal law were presented to the Superior Court on cross-motions for summary

adjudication or summary judgment; and that court found that the original grievance decisions were final and enforceable, and that there was no jurisdiction to revisit the merits in light of Waremart's failure to seek timely review. [Findings and Order etc., Appendix pages A32-A35]. The Superior Court eventually entered judgment enforcing the award and for back pay damages [Appendix pages A36-A38] and later awarded Jones attorney's fees without findings but consistent with the bad faith standard applied in cases under 29 U.S.C. §185. [Appendix pages A39-A40].

The same issues and principles were presented to the California Court of Appeal, First Appellate District, Division One on Waremart's appeal.[2] That court reversed the Judgment on the merits upon its conclusion, based on its *own* reading of the record and the collective bargaining agreement, that the parent committee had mishandled the matter by not appointing a new grievance panel to hear the second firing, and that Waremart's belated oral request in a small claims hearing constituted a legally effective "petition to compel arbitration." [Opinion, Appendix pages A1-A21]. Discretionary Petitions for Rehearing by the Court of Appeal and for Review by the California Supreme Court were denied without comment. [Appendix pages A41 and A42]. The California Supreme Court denied review on December 15, 1999, thus triggering the right and deadline for seeking review on writ of certiorari to this Court.

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2 The California Court of Appeal's opinion (reproduced at Appendix pages A1-A25) shows that the Court was aware of the controlling principles of federal law but did not follow them.

ARGUMENT FOR GRANTING PETITION

This case involves the application of fundamental and, to federal courts, very familiar principles of labor law. Once the first level grievance panel ordered Jones reinstated to his job, the relevant collective bargaining agreement gave Waremart management, as the aggrieved party, the right to appeal that decision to a second level grievance panel. Respondent chose not to take that step.

As in other legal areas, it is well settled that parties to a collective bargaining agreement *must* exhaust contractual grievance procedures before pursuing court remedies. *Republic Steel Corporation v. Maddox*, 379 U.S. 650, 652 (1965).

It is also well settled that any court action to challenge a final decision rendered through a collective bargaining grievance process must be brought on a timely basis. Absent a claim of unfair representation, the statute of limitations in an action either to appeal or enforce such a decision is determined by reference to the analogous state rule. See *Del Costello v. International Brotherhood of Teamsters*, 462 U.S. 151, (1983). In California, the relevant statute is Code of Civil Procedure §1288 (quoted above at page 3) which provides that an action to confirm and enforce an arbitration award must be brought within four years, but an action to set an award aside must be brought within 100 days. *Fortune, Alsweet & Eldridge, Inc. v. Daniel*, 724 F.2d 1355, 1356 (9th Cir. 1983). Alternatively, an action to compel arbitration, which would have been another theory through which Waremart might have challenged the committee's refusal to schedule a hearing on the second firing, must be brought within six months after the refusal, per Ninth Circuit precedent borrowing this limit from 29 U.S.C. §160(b). *Local*

Joint Executive Board v. Exber, Inc., 994 F.2d 674, 675 (9th Cir. 1993); and see *Del Costello, supra.* The Ninth Circuit also has held that

> "[A]n unsuccessful party at arbitration who did not move to vacate an award within the prescribed time may not subsequently raise, as affirmative defenses in a suit to enforce the award, contentions that it could have raised in a timely petition to vacate the award." *Brotherhood of Teamsters & Auto Truck Drivers v. Celotex*, 708 F.2d 488, 490 (9th Cir. 1983).

These are very fundamental principles designed to promote the use of private dispute resolution mechanisms found in collective bargaining agreements and the finality of decisions rendered through those mechanisms, See *Del Costello, supra.* While expressing rhetorical deference to the collective bargaining procedures, the California Court of Appeal nonetheless ignored these principles in order to consider and reevaluate whether the grievance panel's parent committee had acted properly in refusing to appoint another panel to rehear the grievance following Jones' second firing. Based on its own reading of the collective bargaining agreement, the California Court of Appeal found that the parent had mishandled its authority, that respondent had effectively presented the issue by raising it for the first time orally in small claims court eight and a half months later, and consequently that the parties were required to go back and readjudicate the second firing through the grievance procedure.

To reach this conclusion, the California Court of Appeal did at least three things which controlling authorities unequivocally say it cannot do. First it inferred that the original grievance panel had not reached the merits of Jones' firing and thus that Waremart was not collaterally estopped

from firing him again by just changing a date on its termination notice. Not only do courts lack authority to reweigh or reinterpret facts in a manner inconsistent with the grievance decision, *Steelworkers v. American Manufacturing*, *supra*, 363 U.S. at 568 ("courts ... have no business weighing the merits of a grievance"), and *Steelworkers v. Enterprise Wheel*, *supra*, 363 U.S. at 598 ("mere ambiguity ... which permits the inference that the arbitrator may have exceeded his authority, is not a reason for refusing to enforce the award"); the California Court of Appeal's inference was also contrary to what the committee itself said it had done.[3]

Second, from its own reading of the Labor Agreement, the California Court of Appeal reasoned that the Employee Association Committee could not summarily dispose of Jones' appeal from the second firing. Here too, however, the California Court imposed its own judgment on a matter which controlling authorities say must be left to the decision-maker in the grievance process. In *Misco*, *supra*, this Court emphasized that "'procedural' questions which grow out of the dispute and bear on its final disposition are to be left to the arbitrator." *Id.* 484 U.S. at 40. *See also Stead Motors v.*

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3 What the company sought to do here was anticipated and answered in dicta in the case of *Truck Drivers Local 705 v. Schneider Tank Lines*, 958 F.2d 171 (7th Cir. 1992). Responding to the argument that if an employer had no duty to base a firing decision on "just cause," it could, after losing a grievance board hearing, just turn around and fire the employee again, the Court (in an opinion by Circuit Judge Posner) stated as follows.

> "This is simply wrong. The agreement provides that if the board is *not* deadlocked its decision is binding; ... So if the company loses, it *must* reinstate the employee; it cannot thumb its nose at the grievance board. If the company reinstates the employee and then fires him without some fresh reason for doing so, this would be a breach of the agreement to accept the board's decision[.]" 958 F.2d at 174-5 (italics in original).

Automotive Machinists Lodge 1173, 886 F.2d 1200, 1205 (9th Cir. 1989) ["as the parties' surrogate [the arbitrator] cannot 'misinterpret' a collective bargaining agreement"]; and *Line Drivers, Pickup and Delivery Local Union No. 81 v. Roadway Express, Inc.*, 152 F.3d 1098 (9th Cir. 1998) [confirming grievance committee's decision which construed time limits for imposing discipline in manner at variance with express language of bargaining agreement].

Finally, the California Court of Appeal found that the company had not waived its right to arbitration by failing to timely appeal or otherwise seek review of the grievance decisions; and the Court construed the company's oral request, made over eight months later to the small claims judge hearing Jones' enforcement action, as a "petition to compel arbitration."[4] Aside from the point that Waremart had never actually filed any petition or claim for relief of its own, the California Court of Appeal simply ignored the fact that the statutes of limitations on Waremart's claims had expired. As this Court emphasized in *Del Costello, supra,* relatively short statutes of limitations are an important component of the

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4 Ignoring contrary determinations by both the NLRB and trial court, and standing logic on its head, the California Court of Appeal also reasoned that it was Jones rather than the company who was required to exhaust the contract procedures by further appealing a decision wholly in his favor that awarded him complete relief.

It may be worth noting that while the Employee Association was elected to represent employees in negotiating a collective bargaining agreement with management, it was not a union to which employees belonged as members and did not represent individual employees with grievances or disciplinary appeals. Thus Jones was left to his own devices to determine how to enforce his rights, which explains the unlikely choice of small claims court.

deference accorded to private dispute resolution mechanisms under collective bargaining agreements. "This system could easily become unworkable if a decision which has given meaning and content to the terms of an agreement ... could suddenly be called into question ... years later." *Id.*, 462 U.S. at 169, quoting from *United Parcel Service v. Mitchell*, 451 U.S. 56 at 63-64 (1981).

In the *Steelworker* trilogy, this Court set strict limits on the authority of courts to intercede in decisions rendered through collective bargaining grievance procedures. In *Misco*, *supra*, this Court unanimously reaffirmed those limits, rejecting a federal appeals court's effort to alter such a decision on the basis of seemingly compelling public policy grounds. Here no public policy claim of any sort was even raised, yet the California Court of Appeal reweighed and reinterpreted the underlying facts, claims, and rights of the parties in a way that plainly conflicts with relevant decisions of this Court. Rule 10(c).

CONCLUSION

This is not a momentous issue of the day that requires extensive consideration by this Court. It is, however, another example of the problem confronted in the *Steelworker* and *Misco* cases, *supra* -- of an appellate court assuming its normal role of reviewing a labor decision for factual and legal errors rather than confining its inquiry to whether that decision was procured through fraud or failed to draw its essence from the applicable collective bargaining agreement. It is a temptation which the California Court of Appeal was unable to resist here, and to which state appellate courts may remain susceptible due to their limited exposure to federal labor law cases. Petitioner believes this Court can and should dispose of this matter by summary reversal of the Judgment of the California Court of Appeal with directions

to affirm the trial court's judgment on the merits.

Accordingly, petitioner Joseph D. Jones prays that this Court will grant this Petition for Writ of Certiorari and that it will reverse the Judgment of the California Court of Appeal.

Dated: March 10, 2000

Respectfully submitted,

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APPENDIX

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Re: Grievance Filed by Joseph Jones. Decision of internal first level grievance committee (7-27-95) A22

Re: Mr. Joseph Jones. Memorandum decision of parent committee (Sept. 17, 1995) A23-A24

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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIRST APPELLATE DISTRICT

DIVISION ONE

FILED

SEP 24, 1999

Ron D. Barrow, Clerk

JOSEPH D. JONES, Plaintiff and Respondent, v. WAREMART FOODS, INC., Defendant and Appellant.	A082607 & A084234 (Humboldt County Super. Ct. No. 96 DR 0278)

The case before us illustrates the muddle created when parties to a collective bargaining agreement fail to adhere to specified grievance procedures, and the wisdom of restrained judicial interference with those grievance procedures. We conclude that by failing to properly pursue to conclusion the grievance procedures available to him, respondent is foreclosed from maintaining the present action for breach of contract, and reverse the judgment in favor of respondent.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Beginning in June of 1991, respondent was employed by appellant as a variety clerk at the "Waremart Food Store #7" in Eureka, California. The "Waremart Food Store #7 Hourly Employee Policy & Wage Agreement" effective September 12, 1994 (hereafter the Agreement), governed the terms and conditions of respondent's employment with appellant.

According to section P of the Agreement, a grievance arising out of the discharge of an employee must be pres-

ented by the aggrieved party to the Chairperson of the

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Waremart Employee Association #7 and the Vice President of Human Resources within *10* calendar days of the date of the occurrence "giving rise to such grievance," and allege the "policy violations" in detail. Upon receipt of the grievance, the Chairperson of the Employee Association must then select by lot four members of the Employee Association representative committee to serve along with the Chairperson "as a dispute hearings' subcommittee" (hereafter a subcommittee), and set a hearing date within 30 days. After receipt of the evidence, a majority vote of the subcommittee decides the issue presented by the grievance. The subcommittee may reinstate a terminated employee to his or her former position, but back pay is "limited to thirty (30) days' pay averaged over the previous three (3) months prior to the date of the dispute."

An appeal of an adverse decision of the subcommittee may be presented by the aggrieved party to the "Department Managers' Employee Association dispute hearings' sub-committee for review." The decision by the Department Managers' Employee Association dispute hearings' subcommittee, which is the "final appeal permitted" under the terms of the Agreement, is also by majority vote.

Any grievance not resolved by the decision of the Department Managers' Employee Association dispute hearings' subcommittee, "shall be submitted to mandatory arbitration" by "the American Arbitration Association ('AAA'), and "governed by the commercial arbitration rules of the AAA."

The protracted and convoluted course of this dispute began on July 12, 1995, when respondent was given a notice of discharge for "gross misconduct," which was based on

"violations of company personnel policy," "dishonesty," and "falsification of company records." The discharge notice specified: "On *7/08/95*, Joe punched in and reported to work at 11:12 p.m. Joe was observed leaving the store at approximately 11:50 p.m. and returning to work by store security at 12:23 a.m. Joe never punched out and the time away from work was claimed as work time. Leaving the company premise to attend to personal business while claiming to be working is considered dishonesty and falsification of company records. All pay due and owing is being paid at this time." (Italics added.)

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Respondent timely filed a grievance of his discharge by letter in which he claimed he was "inside the store working with another employee" when he was alleged to have been absent. In accordance with the Agreement, a subcommittee was selected to hear the grievance. At the hearing on July 27, 1995, Dick Bryant, the manager of the Eureka Waremart store who represented appellant at the hearing, discovered that the termination notice erroneously listed the date of the violations as July 8, 1995, but presented evidence that respondent "did in fact commit the alleged violations on *July 9, 1995*." (Italics added.) Respondent complained at the hearing that the "conflicting dates" impaired his ability to present a defense. Due to the "error on the termination notice" and resulting prejudice to respondent's defense to the charges, the subcommittee issued a decision on July 27, 1995, which stated: "This grievance, as heard by Waremart #7 Employee Association Committe, To Reinstate with back pay."

Appellant's Human Resources Department, although "unhappy with the decision," instructed Bryant to "comply and then re-terminate Jones for the same violations, correct-

ing the date." The next day Bryant informed respondent that appellant would "honor" the decision of the subcommittee, and award him back pay to date, but terminate him "effective immediately, for his actions on July 9, 1995." On July 28, 1995, appellant issued another termination notice to respondent, identical to the first apart from a change in the date of the incident to "*07/09/95.*" Respondent submitted a "second grievance" by letter dated August 3, 1995, stating as a reason the "absence of evidence to terminate me."

The grievance was presented to the Employee Association, which instead of appointing a subcommittee, decided on August 18, 1995, "to decline the petition to rehear Mr. Joseph Jones's termination grievance on the basis that we, the Association, have heard his grievance. Unless there has been a significant change in the facts that were presented to us, we feel that the outcome would not change. Based on the facts presented, we feel we have enough cause to reinstate Mr. Jones, and, as a committee, stand by our decision." Dick Bryant responded on behalf of appellant one week later with a letter to Vickie Brandi, Chairperson of the Employee Association, which requested appointment

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of a new subcommittee to hear respondent's "still pending" grievance of the second termination notice. Bryant complained: "If the association or its committee refuses to grant Mr. Jones a second grievance hearing Waremart believes the association will be in violation of the Collective Bargaining Agreement." The Employee Association, in turn, accused appellant of failing to comply with the "decision of the Waremart #7 Employee Association Committee's first grievance regarding Mr. Jones," "in direct violation of the Collective Bargaining Agreement," and declined to take further action on the second grievance. Neither appellant nor

respondent pursued a further appeal of the matter under the grievance procedures, and respondent was not reinstated to his employment position.

Instead, respondent filed a complaint with the National Labor Relations Board (NLRB). After an investigation, on November 30, 1995, the NLRB refused to issue a complaint in the matter, based upon a finding that respondent's first grievance had already been processed through the grievance procedures, and the decision ordering his reinstatement was "final and binding upon the parties."

Respondent next filed an action for "breach of employee contract" in small claims court on January 26, 1996, seeking "full back pay from 7-27-95." Appellant contested the "basis for venue" in small claims court, and expressed an intent not to appear at the scheduled hearing. Following a hearing on March 15, 1996, the small claims court granted respondent's request to amend the "complaint," and awarded him "$5,000 and reinstatement of employment with no loss of benefits."

Appellant subsequently moved to vacate the small claims court judgment on grounds that the court improperly failed to continue the hearing to resolve the venue challenge and lack of notice of the amendment of respondent's complaint. The small claims court granted the motion, and scheduled a hearing for May 31, 1996. The hearing was continued to July 16, 1996, to "allow Mr. Jones the opportunity to address the matter through the administrative procedures previously agreed to by the parties." The court also sent a written request to the Employee Association to hear the second grievance

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"pursuant to the Eureka, California Waremart Food Store #7

Hourly Employee Policy and Wage Agreement."

In compliance with the court's request, the Employee Association appointed a subcommittee, and set a hearing of the second grievance for June 12, 1996. Respondent asked to "consult [with] someone" before the hearing, but then informed Vickie Brandi that he "would not be attending the hearing." On June 19, 1996, after the hearing at which evidence was presented by appellant, the subcommittee "determined the facts as stated by Waremart Management for the dismissal of Mr. Joseph Jones are true and justifiable reasons fro termination of said employee," and so advised the small claims court. On the same date, in a letter to the small claims court respondent withdrew his waiver of damages over the $5,000 jurisdictional limit and demanded a transfer of the case to a court with jurisdiction. Respondent opposed the demand for transfer.

On July 5, 1996, respondent filed a Petition for Writ of Prohibition and Mandate to prevent the small claims court from taking further action and to compel a transfer of the case to superior court. The petition was granted, and the case was ordered transferred to superior court.

Respondent subsequently filed an amended complaint with two causes of action: to enforce the first arbitration decision, and for damages for breach of employment contract. Appellant filed a cross-complaint for confirmation of the second arbitration decision. Respondent moved for summary adjudication of his first cause of action, and appellant moved for summary judgment. The trial court found that the first decision of the subcommittee to reinstate appellant was a "final and binding decision entitled to confirmation, entry and enforcement as the judgment of this Court." The court further found that the small claims court was "without jurisdiction" to direct the Employee Association to rehear or

reconsider the prior decision, and granted respondent reimbursement with back pay and benefits. Following a trial on the issue of damages, respondent was awarded reinstatement, with seniority and benefits, full back pay to the date of reinstatement, restoration of shares in the Employee Stock Ownership Plan, and

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prejudgment interest. Pursuant to respondent's motion, he was also awarded attorney fees in the total amount of $41,081.25. The two appeals filed by appellant from the judgment and award of attorney fees have been consolidated.

DISCUSSION

Among the confusing series of decisions made and actions taken on respondent's employment status, our task on appeal is to determine which one is valid and entitled to ultimate enforcement. Appellant submits that both the first and second decisions by the subcommittee pursuant to the grievance procedure were conclusive, with the second standing as the final resolution of the issue. Respondent claims, not surprisingly, that he was properly reinstated by the first decision, which was followed by appellant's breach of his employment contract, as found by the trial court.

We undertake our review attentive to the limited role of the courts in these matters. As the parties agree, federal substantive law governs the validity and enforcement of the collective bargaining agreement,[1] and "[n]ational labor

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1 "In the enforcement of provisions of collective bargaining agreements obligating the parties to arbitrate disputes, state courts exercise concurrent jurisdiction with federal courts. (*Charles Dowd Box Co.* v. *Courtney* (1962) 368 U.S. 502 [82 S.Ct. 519, 7 L.Ed.2d 483].) In so doing state courts must, however, in adjudicating an action which could have been

policy favors arbitration. Indeed, Congress has specifically encouraged labor and management to negotiate private means of dispute resolution: 'Final adjustment by a method agreed upon by the parties is declared to be the desirable method of settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement.' ([Labor

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Management Relations Act], § 203(d) (29 U.S.C. § 173(d) [1978]).) Courts can best serve this policy by giving full effect to the means chosen by the parties for settlement of their differences under a collective bargaining agreement." (*Dryer* v. *Los Angeles Rams* (1985) 40 Cal.3d 406, 412; see also *Chase* v. *Blue Cross of California* (1996) 42 Cal.App.4th 1142, 1159; *Macaulay* v. *Norlander* (1992) 12 Cal.App.4th 1, 6.)

I. The Effect of the First Decision of the Employee Association Subcommittee to Reinstate Respondent.

We commence our inquiry with an analysis of the effect of the first decision of the subcommittee in July of 1995 to reinstate respondent, which appellant concedes was "final and enforceable." Nevertheless, argues appellant, the first decision did not preclude the second termination of

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brought in the federal courts under section 301 of the Labor Management Relations Act, apply federal law. (*Local 174 Teamsters, etc. of America* v. *Lucas Flour Co.* (1962) 369 U.S. 95 [82 S.Ct. 571, 7 L.Ed.2d 593].)" (*O'Malley* v. *Wilshire Oil Co. (1963) 59 Cal.2d 482, 486.) State law is persuasive as guidance to the extent it effectuates the policies underlying federal labor legislation. (Seymour* v. *Hull & Moreland Engineering* (9th Cir. 1979) 605 F.2d 1105, 1109.) California law in the field is not inconsistent with federal law. (See *Banner Entertainment, Inc.* v. *Superior Court* (1998) 62 Cal.App.4th 348, 357.)

respondent. Respondent maintains that "the original Committee decision was *res judicata,*" and as such became "entitled to absolute deference and enforcement by the courts" when it was not challenged by appellant according to the governing grievance procedures.

We agree that the first decision of the subcommittee, rendered following proceedings which complied with the Agreement, was "final and binding on the parties." (See *International Brotherhood of Electrical Workers* v. *Silva* (1979) 96 Cal.App.3d 751, 758-759.) Whether it barred the subsequent action by appellant to terminate respondent is a separate issue, however, one that implicates principles of collateral estoppel. (See *Azusa Land Reclamation Co.* v. *Main San Gabriel Basin Watermaster* (1997) 52 Cal.App.4th 1165, 1212.)

Under the doctrine of collateral estoppel, "parties to a prior proceeding are precluded from relitigating issues determined in the prior proceeding. (See 7 Witkin, Cal.Procedure [(3d ed. 1985)] Judgment, §§ 253-254.)" (*Bob Baker Enterprises, Inc.* v. *Chrysler Corp.* (1994) 30 Cal.App.4th 678, 686.) A prior judgment "'... "operates as an estoppel or conclusive adjudication as to such issues in the second action as were actually litigated and determined in the first action." [Citation.]' (*Clark* v. *Lesher* (1956) 46 Cal.2d 874, 880 [299 P.2d 865].)" (*Sabek, Inc.* v. *Engelhard Corp.* (1998) 65

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Cal.App.4th 992, 997.) The doctrine "rests upon the ground that the party to be affected, or some other with whom he is in privity, has litigated, or had an opportunity to litigate the same matter in a former action in a court of competent jurisdiction, and should not be permitted to litigate it again to the harassment and vexation of his opponent. Public policy and

the interest of litigants alike require that there be an end to litigation." (*Panos* v. *Great Western Packing Co.* (1943) 21 Cal.2d 636, 637, see also *Citizens for Open Access etc. Tide, Inc.* v. *Seadrift Assn.* (1998) 60 Cal.App.4th 1053, 1065.)

The "threshold requirements for application of collateral estoppel are: (1) the issue sought to be precluded must be identical to that decided in prior litigation; (2) the issue must have been actually litigated in the prior litigation; (3) the issue must have been necessarily decided in the prior litigation; (4) the decision in the prior litigation must be final and on the merits; and (5) the party against whom preclusion is sought must be the same as or in privity with, the party to the prior litigation." (*Old Republic Ins. Co.* v. *Superior Court* (1998) 66 Cal.App.4th 128, 151, see also *Lyons* v. *Security Pacific Nat. Bank* (1995) 40 Cal.App.4th 1001, 1015.) "The party asserting collateral estoppel bears the burden of establishing these requirements." (*Lucido* v. *Superior Court* (1990) 51 Cal.3d 335, 341; *Townsel* v. *San Diego Metropolitan Transit Development Bd.* (1998) 65 Cal.App.4th 940, 951.)

We find that the lack of actual litigation and resolution of the issue on the merits prevents operation of the collateral estoppel doctrine here. A prior adjudication operates to foreclose relitigation of any issue "'..."which appears on its face to have been so adjudged, or which was actually and necessarily included therein or necessary thereto." [Citations.]' [Citation.] [¶] An issue is actually litigated under collateral estoppel principles when it "is properly raised, by the pleadings or otherwise, and is submitted for determination, and is determined....' [Citation.]" (*Harman* v. *Mono General Hospital* (1982) 131 Cal.App.3d 607, 616, fn. omitted.) "When determination of an issue was entirely unnecessary to the former judgment, it will not have collateral estoppel effect." (*First N.B.S. Corp.* v. *Gabrielsen* (1986) 179 Cal.App.3d

1189, 1196.) A party seeking to

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invoke the collateral estoppel doctrine must prove that the issue was raised, by the pleadings or otherwise, submitted for determination, and "actually litigated" by unrestricted presentation of evidence. (*Barker* v. *Hull* (1987) 191 Cal.App.3d 221, 226.) It is also the established rule that a judgment "is not conclusive as to matters which might have been passed upon but were not"; the binding effect of a judgment reaches only "matters which *are* passed upon although some factual or legal arguments which could have been presented on the issue were not presented." (*Lazzarone* v. *Bank of America* (1986) 181 Cal.App.3d 581, 592.)

At issue in the second termination action by appellant was the justification for the termination of respondent based upon his conduct on *July 9, 1995*. As we read the record, the first decision of the subcommittee did not actually litigate and resolve that issue. The decision to reinstate respondent was not founded upon a finding that his conduct failed to justify termination, but rather upon the erroneous alleged date of July 8, 1995, stated on the termination notice, and respondent's complaint of lack of adequate notice to present a defense. No finding was made by the subcommittee that respondent either did not commit the alleged acts on July 9, 1995, or those acts, if committed, did not warrant his discharge. Without actual litigation of the issue necessary to the first subcommittee decision, appellant was not precluded from instituting the second termination proceeding. (*Mobilepark West Homeowners Assn.* v. *Escondido Mobilepark West* (1995) 35 Cal.App.4th 32, 48; *Branson* v. *Sun-Diamond Growers* (1994) 24 Cal.App.4th 327, 347-348.)

II. The Second Termination of Respondent.

We proceed to the second termination of respondent, which he properly contested by submitting a grievance that initiated the procedures specified in the Agreement. Ultimately, following a hearing the subcommittee determined that respondent's termination was justified. Appellant argues that the second decision, like the first, is "final," and respondent's failure to exhaust the grievance and arbitration procedures "bars him from obtaining a judicial remedy." Respondent challenges the propriety of the

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subcommittee's second decision. He complains that the subcommittee was "without jurisdiction" to render the second decision for two reasons: first, the refusal to address the second grievance was the "last word on the subject," and appellant's failure to seek review of that decision through the "internal grievance procedures" barred further action; and second, appellant "forfeited whatever remaining right it had to challenge" the "refusal to rehear the matter by failing to file a timely court action."

The Chairperson of the Employee Association initially declined to appoint a subcommittee, consider the second grievance, set a hearing within 30 days, or take evidence, and thus failed to abide by the established, mandatory grievance and arbitration mechanisms. For purposes of the grievance procedures, the letter from the Employee Association dated August 18, 1995, cannot be equated with a valid subcommittee decision to reinstate the employee. According to the Agreement, only an appointed subcommittee, following a hearing on a grievance, may reinstate an employee. The record before us does not establish that the letter at issue followed proper selection of a subcommittee by lot and a hearing at which evidence was presented.[2] The Employee Association had no authority to reinstate respondent -- or

take any other action with respect to the grievance, for that matter -- absent appointment of a subcommittee and a hearing.

Thus, we cannot give any final or binding effect to the Employee Association's purported reassertion of the prior decision to reinstate respondent. Respondent's immediate resort to the courts after the Employee Association declined to hear his second grievance was in direct conflict with the exhaustion of administrative remedies doctrine, which holds that where an administrative remedy is provided, "'... relief must be sought from the administrative body and this remedy exhausted before the courts will act.' (*Abelleira* v. *District Court of Appeal* (1941) 17 Cal.2d 280, 292 [109 P.2d 942, 132

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A.L.R. 715].)" (*City of Los Angeles* v. *Centex Telemanagement, Inc.* (1994) 29 Cal.App.4th 1384, 1387.) "'It is well established that a party to a collective bargaining contract which provides grievance and arbitration machinery for the settlement of disputes within the scope of such contract must exhaust the internal remedies before resorting to the courts in the absence of facts excusing such exhaustion. [Citation.] [¶] ... "[T]his rule, which is analogous to the rule requiring the exhaustion of administrative remedies as a condition precedent to resorting to the courts [citation], is based on a practical approach to the myriad problems, complaints and grievances that arise under a collective bargaining agreement. It makes possible the settlement of such matters by a simple, expeditious and inexpensive procedure, and by persons who, generally, are intimately familiar therewith. [Cita-

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2 Respondent has acknowledged that a subcommittee was not selected to resolve the second grievance.

tion.] The use of these internal remedies for the adjustment of grievances is designed not only to promote settlement thereof but also to foster more harmonious employee-employer relations. [Citation.] Such procedures, which have been worked out and adopted by the parties themselves, must be pursued to their conclusion before judicial action may be instituted unless circumstances exist which would excuse the failure to follow through with the contract remedies."' (*Johnson* v. *Hydraulic Research & Mfg. Co.* [(1977)] 70 Cal.App.3d 675, 679-680.) This California rule is consistent with the strong federal policy in favor of arbitration of labor disputes under existing collective bargaining agreements." (*Alpha Beta, Inc.* v. *Superior Court* (1984) 160 Cal.App.3d 1049, 1058; see also *Croston* v. *Burlington Northern R. Co.* (9th Cir. 1993) 999 F.2d 381, 386; *Carr* v. *Pacific Maritime Ass'n* (9th Cir. 1990) 904 F.2d 1313, 1317; *Charles J. Rounds Co.* v. *Joint Council of Teamsters No. 42* (1971) 4 Cal.3d 888, 899; *DeVaughn Peace, M.D., Inc.* v. *St. Francis Medical Center* (1994) 28 Cal.App.4th 454, 460.)[3]

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"'..."... Before seeking judicial review a party must show that he has made a full presentation to the administrative agency upon all issues of the case and at all prescribed stages of the administrative proceedings." [Citations.]' (*Edgren* v. *Regents of University of California* (1984) 158 Cal.App.3d 515, 520 [205 Cal.Rptr. 6], citing *Bleeck* v. *State Board of Optometry* (1971) 18 Cal.App.3d 415, 432 [95 Cal.Rptr. 860].)" (*Lopez* v. *Civil Service Com.* (1991) 232

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3 The California and federal exhaustion of administrative remedies doctrines are essentially identical, the former being derived from the latter. (*Public Employment Relations Bd.* v. *Superior Court* (1993) 13 Cal.App. 4th 1816, 1825, 1827.)

Cal.App.3d 307, 311.) "'The administrative remedy must be pursued as a condition precedent to the lawsuit. [Citations.]' (*Westinghouse Elec. Corp.* v. *County of Los Angeles* (1974) 42 Cal.App.3d 32, 39 [116 Cal.Rptr. 742].)" (*City of Los Angeles* v. *Centex Telemanagement, Inc., supra,* 29 Cal.App.4th at p. 1388.)

After the Employee Association failed to appoint a subcommittee and hold a hearing on the grievance, respondent had two options: file an appeal with the Department Managers' Employee Association dispute hearings; subcommittee, followed, if necessary by submission of the matter to an arbitrator; or, file a petition to compel arbitration (Code Civ. Proc., § 1281.2).[4] The exhaustion doctrine required respondent to take advantage of established grievance procedures rather than immediately file a breach of contract action. An "employee is not required to file a grievance if he does not wish to do so, but he must first pursue this administrative remedy before resorting to the judicial process." (*Morton* v. *Superior Court* (1970) 9 Cal.App.3d 977, 982; see also *Yamaha Motor Corp.* v. *Superior Court* (1986) 185 Cal.App.3d 1232, 1240.) Even if respondent felt that the

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4 Code of Civil Procedure section 1281.2 states in part: "On petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy and that a party thereto refuses to arbitrate such controversy, the court shall order the petitioner and the respondent to arbitrate the controversy if it determines that an agreement to arbitrate the controversy exists, unless it determines that : [¶] (a) The right to compel arbitration has been waived by the petitioner; or [¶] (b) Grounds exist for the revocation of the agreement. [¶] [] [¶] If the court determines that a written agreement to arbitrate a controversy exists, an order to arbitrate such controversy may not be refused on the ground that the petitioner's contentions lack substantive merit." (See also *Engineers & Architects Assn.* v. *Community Development Dept.* (1994) 30 Cal.App.4th 644, 652.)

Employee Association's refusal to consider his second grievance raised an issue concerning the propriety or applicability of the grievance process, his initial remedy was through existing administrative channels. (*Alta Loma School Dist.* v. *San Bernardino County Com. on School Dist. Reorganization* (1981) 124 Cal.App.3d 542, 556.) "Where there is some 'question about the applicability of [a] grievance procedure,' the employee must 'present the question to the [agency] so that [it can] decide the issue in the first instance.' [Citation.]" (*Bockover* v. *Perko* (1994) 28 Cal.App.4th 479, 490; see also *Board of Police Commissioners* v. *Superior Court* (1985) 168 Cal.App.3d 420, 431.) The Department Managers' Employee Association dispute hearings' subcommittee and an arbitrator were available to respondent to pursue his grievance. By circumventing the remaining available stages of the administrative process, respondent is foreclosed from bringing suit for breach of contract. (*Bockover* v. *Perko, supra,* at p. 492.)[5]

Even if we place the burden of obtaining review of the Employee Association's refusal to hear the second grievance upon appellant,[6] we find that the ultimate decision of the

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5 "An employee will be excused from exhausting administrative remedies where (1) the union has sole power under the contract to invoke the higher levels of the grievance procedure and if the union has prevented the employee from exhausting his remedies by its wrongful refusal to process the grievance, or (2) where the alleged breach of duty relates to the union's conduct in negotiating the collective bargaining agreement." Neither exception applies here. (*Croston* v. *Burlington Northern R. Co., supra,* 999 F.2d at p. 386.) Nor were the grievance procedures unavailable to respondent or inadequate.

6 We observe that in administrative disciplinary proceedings, the basic burden of proof generally rests with the employer as the party who made

subcommittee to uphold the termination was valid and binding on the parties. Appellant did not run afoul of the exhaustion doctrine, but instead sought to obtain resolution of the dispute through the grievance process despite respondent's resort to litigation. Appellant complained of the refusal of the Employee Association to adhere to

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the grievance procedures provided in the agreement. And although no immediate appeal of the matter was made to the Department Managers' Employee Association dispute hearings' subcommittee, when respondent filed his action in small claims court, appellant requested arbitration of the grievance by the subcommittee in accordance with the Agreement.[7] Thus was the grievance, after a brief diversion to small claims court, returned to the appropriate administrative forum when the Employee Association, at the direction of the court and without objection by respondent, finally agreed to appoint a subcommittee to properly hear the matter.

Nor do we find that appellant waived the right to insist upon resolution of the grievance pursuant to the collective bargaining agreement, despite its failure to directly appeal the Employee Association's initial refusal to decide the second grievance. Arbitration is not a matter of absolute right, and the right to compel arbitration may be waived. (*Sobremonte* v. *Superior Court* (1998) 61 Cal.App.4th 980, 991; *Davis* v. *Continental Airlines, Inc.* (1997) 59

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the charges. (See *Webster* v. *Trustees of Cal. State University* (1993) 19 Cal.App.4th 1456, 1462-1464; *Layton* v. *Merit System Commission* (1976) 60 Cal.App.3d 58, 64; *Martin* v. *State Personnel Bd.* (1972) 26 Cal.App.3d 573, 582.)

7 Appellant's request, as we view it, was the equivalent of a petition to compel arbitration.

Cal.App.4th 205, 211.) "Since the right to arbitrate flows from an agreement of the parties, it may be lost by a failure to assert it in a proper and timely manner." (*American Home Assurance Co.* v. *Benowitz* (1991) 234 Cal.App.3d 192, 201.) "[T]he term 'waiver' denotes the voluntary relinquishment of a known right. But it can also mean the loss of an opportunity or a right as a result of a party's failure to perform an act it is required to perform, regardless of the party's intent to ... relinquish the right.' [Citation.]" (*Engalla* v. *Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 982-983; see also *Platt Pacific, Inc.* v. *Andelson* (1993) 6 Cal.4th 307, 315.) "There is no single test for waiver of the right to compel arbitration, but waiver may be found where the party seeking arbitration has (1) previously taken steps inconsistent with an intent to invoke arbitration, (2) unreasonably delayed in seeking arbitration, or (3) acted in bad faith and with willful misconduct." (*Davis* v. *Continental Airlines, Inc., supra,* at

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pp. 211-212; see also *Christensen* v. *Dewor Developments* (1983) 33 Cal.3d 778, 782; *Keating* v. *Superior Court* (1982) 31 Cal.3d 584, 605; *Chase* v. *Blue Cross of California, supra,* 42 Cal.App.4th at p. 1151; *National Farm Workers Service Center, Inc.* v. *M. Caratan, Inc.* (1983) 146 Cal.App.3d 796, 803.)

"In determining waiver, a court can consider '(1) whether the party's actions are inconsistent with the right to arbitrate; (2) whether "the litigation machinery has been substantially invoked" and the parties "were well into preparation of a lawsuit" before the party notified the opposing party of an intent to arbitrate; (3) whether a party either requested arbitration enforcement close to the trial date or delayed for a long period before seeking a stay; (4) whether a defendant

seeking arbitration filed a counterclaim without asking for a stay of the proceedings; (5) "whether important intervening steps [e.g., taking advantage of judicial discovery procedures not available in arbitration] had taken place"; and (6) whether the delay "affected, misled, or prejudiced" the opposing party. [Citations.]'; [Citation.]" (*Sobremonte* v. *Superior Court, supra,* 61 Cal.App.4th at p. 992.)

Appellant's failure to file an appeal to the Department Managers' Employee Association dispute hearings; subcommittee does not, under the facts presented, constitute a waiver.[8] Appellant immediately complained to the Employee Association that the failure to hold a grievance hearing violated the collective bargaining provisions. Appellant was not obviously aggrieved by the Employee Association's refusal to hold a hearing on the grievance, and so had no apparent reason to file an appeal. Nevertheless, appellant continued to complain of lack of compliance with grievance procedures, and ultimately convinced the small claims court to recommend that a hearing be held by the subcommittee. Respondent, not appellant, invoked the machinery of litigation. While appellant did not obtain an administrative hearing for nearly a year, respondent's NLRB

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claim and small claims court action created confusion as to the appropriate procedure to be followed in the case. In these circumstances, we do not think the delay was unreasonable. Appellant's actions were not inconsistent with the exercise of the right to arbitration, and, we therefore conclude, no waiver by appellant resulted. Moreover, respondent waived any complaint with the return of the grievance

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8 The Agreement does not impose a time limit for appeals to the Department Managers' Employee Association dispute hearings' subcommittee.

from small claims court to arbitration and the hearing conducted by the subcommittee by apparently acquiescing in those procedures. (See *Marino* v. *Writers Guild of America, East, Inc.* (9th Cir. 1993) 992 F.2d 1480, 1484; *United Steelworkers, etc.* v. *Smoke-Craft, Inc.* (9th Cir. 1981) 652 F.2d 1356, 1360.)

Presentation of the grievance to the subcommittee was therefore proper, and the decision on the second grievance was not beyond the authority of the subcommittee. Following a hearing and presentation of evidence, the subcommittee issued a second decision which upheld the termination of respondent. As we have observed, according to the Agreement the necessary next step in the grievance process was an appeal to the Department Managers' Employee Association subcommittee, followed by arbitration. Once more, respondent failed to adhere to the grievance procedures; rather, he maintained his breach of contract action in superior court. By declining to pursue the grievance procedures to conclusion, respondent once again ran afoul of the exhaustion of administrative remedies doctrine. The appropriate remedy is dismissal of a lawsuit filed before administrative remedies are exhausted. (*United Enterprises, Ltd.* v. *Assessment Appeals Bd.* (1994) 22 Cal.App.4th 152, 162; *Park 'N Fly of San Francisco, Inc.* v. *City of South San Francisco* (1987) 188 Cal.App.3d 1201, 1207-1208.)

Finally, we further conclude that respondent has not waived the right to appeal the subcommittee's second decision to deny his grievance. He improperly but promptly sought review of the decision by pursuing his superior court action for breach of contract. Thus, although respondent's breach of contract action was premature, he is still entitled to pursue arbitration of his grievance through the channels remaining to him following the

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subcommittee's decision. (See *Croston* v. *Burlington Northern R. Co., supra,* 999 F.2d at p. 386.)

DISPOSITION

The judgment is reversed and respondent's action for breach of employment contract and to enforce the first subcommittee decision to reinstate him is dismissed without prejudice to respondent's's right to pursue an administrative appeal of the second decision of the subcommittee to sustain his termination.[9]

Each party shall bear its costs on appeal.

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Swager, J.

We concur:

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Stein, Acting P.J.

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Marchiano, J.

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9 In light of our conclusion, we need not address the remaining issues discussed by the parties regarding damages and the award of attorney fees.

7-27-95

Re: Grievance - Filed by Joseph Jones on 7-27-95

This grievance, as heard by Waremart #7 Employee Arbitration Committee, To Reinstate with back pay.

Signed:

/s/ Danny Hornaday

/s/ Trevor Benefield

/s/ Vickie Brandi

/s/ Max J. Anthrim

/s/ Tony [illegible]

WAREMART EMPLOYEES ASSOCIATION #7

MEMORANDUM

September 17, 1995

TO: Dick Bryant, Manager
Waremart #7

FROM: Waremart #7 Employees Association

RE: Mr. Joseph Jones

Please accept this memorandum as a response to your correspondence of August 25, 1995. Per our conversations on several occasions, you requested a decision of the Waremart Employees Association #7 Grievance Committee regarding Mr. Joseph Jones. I explained that I was not prepared because I did not have the signatures of the committee members. You reassured me that it was not an issue. You were awaiting the decision of the committee so you could contact Mr. Jones and inform Roger Coshell.

On July 27, 1995, the sub-committee issued a decision to reinstate Mr. Jones and return him to work with full back pay based on lack of evidence and conflicting dates and times presented by management.

If Waremart management believe Mr.. Jones was guilty of alleged occurrences, they should have acted according to the "Waremart Foods Hourly Employee Working Conditions and Wage Agreement", Section C and the "Company Personnel Policy", Section XV.

Waremart #7 Employees Association Committee is not required to re-hear a second grievance with no discovery of new evidence. Waremart management has not upheld the decision of the Waremart #7 Employees Association Committee's fire grievance regarding Mr. Jones.

In conclusion, Waremart #7 Employees Association took into consideration the conflicting dates and times by Waremart management when it made its original decision and the inability to uphold the decision of the Employee Association Committee is in direct violation of the Collective Bargaining Agreement and undermines the ability of the Association to represent employees at Waremart #7.

Sincerely,

WAREMART #7 EMPLOYEES ASSOCIATION COMMITTEE

9/19/95 9/19/95
/s/ Vickie Brandi /s/ Trevor Benefield /s/ Lori Stark

/s/ John Jerome /s/ Danny Hornaday

/s/ Albert [illegible] /s/ [illegible] /s/ Max J. Anthrim

[Seal] NATIONAL LABOR RELATIONS BOARD
Region 20
901 Market Street, Suite 400
San Francisco, California 94103-1735
Telephone 415/356-5205
FAX 415/356-5156
TDD 415/356-5213

November 30, 1995

Mr. Joseph Jones
3411 Albee Street
Eureka, California 95503

Re: Waremart, Inc.
Case 20-CA-26962

Dear Mr. Jones:

The above-captioned case, charging a violation under Section 8 of the National Labor Relations Act, as amended, herein the Act, has been carefully investigated and considered.

The evidence shows that your termination has been processed through the grievance/arbitration procedure and the Employee Association Committee has ordered your reinstatement. Since the decision of the Employee Association Committee appears to be final and binding upon the parties, in these circumstances it is the policy of the Board to defer to such an award. Therefore, the award is enforceable in the Courts. See *Malrite of Wisconsin*, 198 NLRB 241 (1972); *J & H Rainwear, Inc.*, 273 NLRB 497. I am, therefore, refusing to issue complaint in this matter.

Pursuant to the National Labor Relations Board Rules and Regulations, you may obtain a review of this action by filing an appeal with the General Counsel addressed to the Office of Appeals, National Labor Relations Board, Washington, D.C., 20570, and a copy with me. This appeal must contain a complete statement setting forth the facts and reasons upon which it is based. The appeal must be received by the

General Counsel in Washington, D.C., by the close of business at 5:00 p.m. on Thursday, December 14, 1995. Upon good cause shown, however, the General Counsel may grant special permission for a longer period within which to file Any request for extension of time must be submitted to the Office of Appeals in Washington, D.C., and a copy of any such request should be submitted to me.

If you file an appeal, please complete the notice forms I have enclosed with this letter and send one copy of the form to each of the other parties. Their names and addresses are listed below. The notice forms should be mailed at the same time you file the appeal, but mailing the notice

forms does not relieve you of the necessity for filing the appeal itself with the General Counsel and a copy of the appeal with the Regional Direction within the time stated above.

Very truly yours,

/s/

Robert H. Miller
Regional Director

RHM:BR:mrb
Enclosures

cc: General Counsel
National Labor Relations Board
Office of Appeals
Washington, D.C. 20570

Richard Bryant, General Manager
Waremart, Inc.
636 West Harris Street
Eureka, California 95501

Louis Livingstone, Esquire
Miller, Nash, Wiener, Hager & Carlsen
3500 U S Bancorp Tower
111 SW Fifth Street
Portland, Oregon 97204-3699

Chairperson
Waremart Employees Association #7
636 West Harris Street
Eureka, California 95501

John D. Fouts, Esquire
Suite 8
840 E Street
Eureka, California 95501

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Humboldt County Superior Court
Civil Division

JOSEPH JONES
VS. S38548
WAREMART FOODS

Date: 05/31/96 Time: 8:30 am Room: SMALL
Judge: Hon. W. Bruce Watson
Event Type: Motion to Vacate

Clerk: Cathy Meredith

Plaintiff Joseph Jones present, sworn & testified.
Defendant Waremart Foods present, represented by Jim Smith and Roger Coshell, sworn & testified.

Motion to Vacate heard.

The Court recommends that the matter be referred back to the Waremart Grievance Committee for a hearing regarding reinstatement from the second termination.

The issue of back payment of slaary is pending the decision of the Employee Grievance Committee regarding the issue of reinstatement from the second termination.

Judge Watson will write a letter to the Employee Grievance Committee with his recommendation for a new hearing. Vickie Brandi is chairperson of the committee.

The Committee has the authority to order back payment of salary.

Matter continued to July 16, 1996 at 8:30 before Judge Watson for outcome of Grievance Committee's decision.

PAGE: 1 06/18/96 15:17:56

John Cumming (SBC #068796)
517 3rd St. #28/P.O. Box 704
Eureka, California 95502
(707) 445-1818

Attorney for petitioner
Joseph D. Jones

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SUPERIOR COURT OF CALIFORNIA, COUNTY OF HUMBOLDT

JOSEPH D. JONES

Petitioner,

v.

SMALL CLAIMS COURT, EUREKA DIVISION, OF OF THE HUMBOLDT COUNTY SUPERIOR AND MUNICIPAL COURT,

Respondent,

WAREMART FOODS, INC.,

Real Party in Interest.
_____/

No. 96 CP 0488

(Small Claims No. S38548)

ORDER FOR ISSUANCE OF PEREMPTORY WRIT AND SETTING CASE MANAGEMENT CONFERENCE

Upon the verified petition and supporting documents and the responses of the other parties thereto, and good cause appearing,

IT IS ORDERED that a peremptory writ of prohibition and mandate shall issue, commanding the Small Claims Division of the Humboldt County Superior and Municipal Court to conduct no further proceedings in Case No. S38548 and to

certify the papers and proceedings in said action and transfer same to the Superior Court of California for the County of Humboldt.

IT IS FURTHER ORDERED that this matter is set for a Case Management Conference on Friday, August 16, 1996, at 2:00 p.m. in

[page 2]

Department III of this Court. Petitioner Jones and real party Waremart shall file and serve Case Management Conference Reports no later than August 9, 1996.

IT IS FURTHER ORDERED that petitioner Jones is granted leave to file an Amended Complaint and shall endeavor to have said pleading on file prior to the Case Management Conference.

Dated: 7-30-96

/S/
Hon. J. Michael Brown
Judge of the Superior Court

John Cumming (SBC #068796)
517 3rd St. #28/P.O. Box 704
Eureka, California 95502
(707) 445-1818

Attorney for plaintiff
Joseph D. Jones

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L SEP -5, 1997
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HUMBOLDT **SUPERIOR** & MUNICIPAL COURT

JOSEPH D. JONES

Plaintiff,

v.

WAREMART FOODS, INC.,
and DOES 1 through 10,

Defendants.
_____/

No. 96 DR 0278

FINDINGS AND ORDER GRANTING SUMMARY ADJUDICATION TO PLAINTIFF AND DENYING SUMMARY JUDGMENT TO DEFENDANT

WAREMART FOODS, INC.

Cross-complainant,

v.

JOSEPH D. JONES,

Cross-defendant.
_____/

Plaintiff's Motion for Summary Adjudication and defendant and cross-complainant's Motion for Summary Judgment came on for hearing before this Court, the

Honorable J. Michael Brown, Superior Court Judge, presiding, on July 18, 1997. John Cumming appeared for plaintiff and cross-defendant Joseph D. Jones, and Robert G. Hulteng of the law firm Littler Mendelson appeared for defendant and cross-complainant Waremart Foods, Inc. The matter was argued and submitted, and on August 6, 1997, the Court filed

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its written Ruling on Motions for Summary Adjudication. Good cause appearing that plaintiff Jones' Motion for Summary Adjudication should be granted and that defendant and cross-complaint Waremart's Motion for Summary Judgment should be denied, the Court now makes the following findings and Order.

FINDINGS

1. The July 27, 1995 decision of the Dispute Hearings Subcommittee which upheld plaintiff's grievance and ordered his reinstatement with back pay is a final and binding decision entitled to confirmation, entry and enforcement as the judgment of this Court.

2. The Employee Association Committee determined there was no separate basis for the second firing of plaintiff, and that the second firing simply constituted a refusal by Waremart to reinstate plaintiff in accordance with the July 27, 1995 decision of the Dispute Hearings Subcommittee.

3. Waremart failed to appeal either the July 27 decision or the Employee Association's determination not to rehear the matter in the manner prescribed by the applicable Collective Bargaining Agreement. Waremart also failed to seek any form of court relief from either action within the time limits prescribed by law.

4. The Small Claims Court was without jurisdiction to

order, and the Employee Association Committee was without jurisdiction to rehear or reconsider the matter of plaintiff's firing in May and June of 1996.

5. Plaintiff is entitled to reinstatement with back pay and

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benefits under the terms of the July 27, 1995 decision, which remains final and binding. However, a triable issue of fact remains with respect to the extent of plaintiff's damages under his Second Cause of Action for Breach of Contract, which was not a subject of plaintiff's motion.

ORDER

Now therefore, in accordance with the foregoing findings,

IT IS ORDERED that plaintiff Jones' Motion for Summary Judgment is granted and defendant and cross-complainant Waremart's Motion for Summary Judgment is denied. The July 27, 1995 decision of the Dispute Hearings Subcommittee which upheld plain-tiff's grievance and ordered his reinstatement with back pay is confirmed in all respects as a final and binding decision entitled to entry and enforcement as the judgment of this Court.

IT IS FURTHER ORDERED that a triable issue of fact remains with respect to the extent of plaintiff's damages under his Second Cause of Action for Breach of Contract.

Dated: 9-3-97

/S/
Hon. J. Michael Brown
Judge of the Superior Court

APPROVED AS TO FORM:

LITTLER MENDELSON
A Professional Corporation

By: _____
Robert G. Hulteng
Attorneys for defendant and
cross-complainant Waremart Foods, Inc.

John Cumming (SBC #068796)
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Attorney for plaintiff
Joseph D. Jones

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HUMBOLDT **SUPERIOR** & MUNICIPAL COURT

JOSEPH D. JONES

Plaintiff,

v.

WAREMART FOODS, INC.,
and DOES 1 through 10,

Defendants.
_____/

No. 96 DR 0278

JUDGMENT

[revised proposal 3/27/98]

WAREMART FOODS, INC.

Cross-complainant,

v.

JOSEPH D. JONES,

Cross-defendant.
_____/

The merits of this action were submitted on s-motions for summary adjudication and judgment and determined by this Court's Findings and Order filed on September 5, 1997. The remaining issues were then tried before

the Court, the Honorable J. Michael Brown, presiding, on December 30, 1997. The matter having been submitted, the Court having on February 18, 1998, issued its Memorandum of Decision, and good cause appearing that judgment should enter in favor of the plaintiff and cross-

[page 2]

defendant Joseph D. Jones and against the defendant and cross-complainant Waremart Foods, Inc., now therefore,

IT IS ORDERED, ADJUDGED AND DECREED that the July 27, 1995 decision of the Dispute Hearings Subcommittee which upheld plain-tiff's grievance and ordered his reinstatement with back pay is confirmed in all respects as the final, binding, and enforceable decision and judgment of this Court.

IT IS FURTHER ORDERED that defendant Waremart Foods, Inc. shall reinstate plaintiff Jones forthwith to his position as a full time variety clerk on the night shift, at such pay rate and with such seniority and benefits as if plaintiff had continued to work continuously in that capacity from January 27, 1995 through the date of defendant's compliance with this Judgment.

IT IS FURTHER ORDERED that defendant Waremart Foods, Inc. shall pay to plaintiff Jones damages in the amount of $53,040.35 for his back pay through February 21, 1998.

IT IS FURTHER ORDERED that defendant Waremart Foods, Inc. shall pay to plaintiff Jones prejudgment interest on the foregoing back pay damages in the amount of $6,047.82 plus an additional $14.53 per day from February 22, 1998 through the date of entry of judgment.

IT IS FURTHER ORDERED that defendant

Waremart Foods, Inc. shall restore to plaintiff Jones the 574 stock ownership shares that had been allocated to plaintiff through the Employee Stock Ownership Plan as of April 1, 1995, and defendant Waremart Foods, Inc. shall also pay or credit to plaintiff Jones an additional 270 stock ownership shares for the plan years ending March 31,

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1996 and March 31, 1997.

IT IS FURTHER ORDERED that this Court retains jurisdiction to determine and award additional damages for back pay and benefits from February 22, 1998 through the date of plaintiff's reinstatement in compliance with the terms of this Judgment.

IT IS FURTHER ORDERED that plaintiff is awarded his costs of suit herein; to the extent any of those costs have been waived under California Rule of Court 985, they shall be reimbursed by defendant Waremart Foods, Inc. to the County of Humboldt.

Dated: 4-1-98

/S/

Hon. J. Michael Brown
Judge of the Superior Court

John Cumming (SBC #068796)
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(707) 445-1818

Attorney for plaintiff
Joseph D. Jones

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SUPERIOR COURT OF CALIFORNIA, COUNTY OF HUMBOLDT

JOSEPH D. JONES

Plaintiff,

v. No. 96 DR 0278

WAREMART FOODS, INC., and DOES 1 through 10,

Defendants.

ORDER AWARDING ATTORNEY'S FEES

_____/

and Related Cross Action.

_____/

This matter came before the court on plaintiff's Motion for an Award of Attorney's Fees. Upon consideration of the arguments and evidence submitted by the parties and the record of proceedings in this matter, and good cause appearing,

IT IS ORDERED that defendant Waremart Foods, Inc. shall pay to plaintiff Joseph D. Jones reasonable attorney's fees in the amount of $41,081.25.

Dated: AUG 17 1998

/S/
Hon. J. Michael Brown
Judge of the Superior Court

Approved as to form:

/S/
Littler, Mendelson by John C. Fish, Jr.
Attorneys for defendant Waremart Foods, Inc.

COURT OF APPEAL, FIRST APPELLATE DISTRICT
350 MCALLISTER STREET
SAN FRANCISCO, CA 94102
DIVISION 1

JOSEPH D. JONES,
Plaintiff and Respondent,
v.
WAREMART FOODS, INC.,
Defendant and Appellant.

FILED
OCT 19 1999
Ron D. Barrow, Clerk

A082607 and A084234
Humboldt County No. 96DR0278

BY THE COURT:

The petition for rehearing is denied.

Date: OCT 19 1999 SWAGER, J., ACTING P.J.

First Appellate District, Division One, No. A082607/A084234

S083334

IN THE SUPREME COURT OF CALIFORNIA
EN BANC

JOSEPH D. JONES, Respondent

v.

WAREMART FOOD INCORPORATED, Appellant

SUPREME COURT
FILED
DEC 15 1999
Robert Wandruff Clerk

Respondent's petition for review DENIED.

GEORGE
Chief Justice